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SUPREME COURT OF THE UNITED STATES

October Term, 1928

NO. [redacted] 81.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Petitioner

Versus

MRS. MYRTIS COOK, ET AL., Respondents

BRIEF AGAINST PETITION FOR WRIT OF CERTIORARI

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(34,194)

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SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Petitioner

Versus

MRS. MYRTIS COOK, ET AL., Respondents

BRIEF AGAINST PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, Respondents, respectfully submits the following brief against the application of Petitioner for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit in the above entitled cause:

FIRST COUNTER PROPOSITION
(To Petitioner's First Proposition)

Where an employee contracts to work for an employer as a mechanic in employment that is non-maritime in its na-

ture, and the employer insures itself against liability for accidental injuries to the employee received in the course of his employment, under the provisions of an elective state compensation act, which provides an exclusive remedy to the employee for all compensable injuries so received, which both the employee and employer elect to accept, and the employee continues such work, as a mechanic in a Ford assembling plant for more than three years, and is injured in the hold of the employer's vessel where he was ordered to go to assist in the unloading of his employer's cargo from his employer's ship, the enforcement of the rights of the employee under the provisions of the state compensation act, which both the employee and employer have elected to accept, does not work a material prejudice to any characteristic feature of the general maritime law, and is not in conflict with the Constitutional provision extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

STATEMENT

Respondents affirmatively alleged and proved that deceased was employed on July 10, 1923, as a mechanic by the Ford Motor Company and worked as such for more than three years in the assembling plant at Houston, Texas, both parties contracting with reference to and electing to be bound by the provisions of the Workmen's Compensation Act, of the State of Texas (R., 34 and 35.) It was further shown that eighteen months thereafter, on December 20, 1924, the Ford Motor Company sent its ship loaded with its automobile parts to Houston, and during the following twenty-five months, at irregular intervals, sent six additional shiploads of its parts in its ships to Houston. It was shown that the deceased assisted in unloading one of these ships on December 16, 1926, nearly three and a half years after his employment, and again on January 26, 1927, on which last named date, while in the hold of the vessel, he sustained injuries which caused his death.

The Workmen's Compensation Act of the State of Texas is wholly elective as to both the employee and the employer and

either may refuse to be bound or cease to be bound thereby by complying with the provisions of the law as will appear from the sections of said Act pertinent to this case which are included in this brief as Appendix A.

AUTHORITIES

Alaska Packers Association vs. Industrial Commission, 72 L. Ed, 415; 48 Sup. Ct. Rep., 346.

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Berry vs. Donovan & Sons, 115 Atlantic, 250.

Millers' Indemnity Underwriters vs. Braud, 270 U. S., 59; 70 L. Ed., 470; 46 Sup. Ct. Rep., 194.

Lindberg vs. Southern Casualty Company, 15 Fed. (2d) 54; 18 Fed. (2d), 453; certiorari refused 274 U. S., 759; 71 L. Ed., 1337; 47 Sup. Ct. Rep., 769.

State Industrial Commission vs. Nordenholt Corporation, 259 U. S., 263; 66 L. Ed., 933; 42 Sup. Ct. Rep., 473.

State Industrial Board vs. T. & T. Co., 273 U. S., 639; 71 L. Ed., 817; 47 Sup. Ct. Rep., 90 (reversing 240 N. Y., 292; 148 N. E., 527.)

Ketchikan L. & S. Co. vs. Bishop, 24 Fed. (2d), 63.

Ex Parte Harvard, 211 Ala., 605; 100 So., 897.

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Toland's Case, 258 Mass., 470; 155 N. E., 602.

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Scott vs. Dept. of Labor and Industries, 130 Wash., 598; 228 Pac., 1013.
Eclipse Mill Co. vs. Dept. of Labor and Industries, 141 Wash., 172; 251 Pac., 130.
Rickert vs. Industrial Accident Commission, 56 A. L. R., 848.

ARGUMENT

This action sounds in contract rather than in tort. No negligence on the part of the employer was alleged or proved. No action in admiralty could have been sustained for the injuries received by reason of that fact, in fact the employee had voluntarily contracted away his right to resort to any remedy other than the exclusive remedy provided by the State compensation act for parties electing to abide thereby. Therefore, no violence is done to any characteristic feature of the general maritime law by enforcing the provisions of the Workmen's Compensation Act of Texas, in contemplation of which employee and employer had contracted nearly three and a half years prior to the employee doing any work of a maritime nature (R. 35.) The parties had sustained the relationship of employer and employee for a long period of time, during which the work of the employee was solely that of a mechanic in an automobile assembly plant. During that time, without doubt, the employee was protected by the provisions of the Compensation Act. He was then ordered by his employer to help unload his employer's ship, and in doing that he sustained an injury which resulted in his death. No cause of action in admiralty could have been made because no single act of negligence could have been proved. With this state of facts, can it be said that to enforce the contract consciously entered into by the parties at the time of employment and continued for a long period of time would necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of the law in its international or interstate relations? We most respectfully insist that it would not.

This Court said in the case of Grant Smith-Porter Ship Co. vs. Rohde, supra:

"The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it can not properly be said that they consciously contracted with each other in contemplation of the general system of maritime law."

And again in the case of Millers' Indemnity Underwriters vs. Braud, supra, (which arose in Texas) which involved a maritime tort, this Court said:

> "In the case now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

And in the more recent case of Alaska Packers Association v. Industrial Accident Commission this Court further emphasized the decisions above quoted from. Peterson was employed to do work on the water as well as on land; and this Court summarily disposed of the contention of appellant that when injured Peterson was doing maritime work under a maritime contract, and therefore was not within the provisions of the California Compensation Act, by stating:

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the

parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

In the case of Rickert v. Industrial Accident Commission, supra, the Supreme Court of Oregon said:

"This is not a case of actional negligence arising upon the navigable waters of the state or elsewhere. The facts do not constitute a tort, nor an actionable injury, but a simple accident, without fault on the part of any person. Under the provisions of the Workmen's Compensation Act, compensation is to be made to the injured workman without regard to fault or other cause of the injury. The work of plaintiff as a longshoreman, in which he was engaged at the time he sustained his injury, was maritime in its nature. His contract of employment was maritime, and the accidental injury sustained by him in the course of such employment was maritime. So. P. Co. v. Jensen, supra. The rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. But notwithstanding the nature of his employment at the time he was injured, the contract between employer and employee with reference to their rights and liabilities was a lawful one, and did not offend against any superior law."

To the same effect is the decision of the Supreme Court of Oregon in the case of West v. Kozer, 104 Oregon, 94; 206 Pac., 542, which reads in part as follows:

"The casualties and injuries described in the writs appear to have been pure accidents, for which no one was responsible or to blame. No 'case' in law or equity could arise from such untoward evidence. There is nothing out of which can be constructed a 'case' for any court; and since there is no 'case' the inhibition of the national Constitution form no obstacle to the relief here sought by the petitioners."

Referring still further to decisions of the courts of last resort in the states, we quote from the case of Berry v. Donovan & Sons. Donovan & Sons, a stevedoring corporation, contracted to unload a ship and employed Berry to assist in the work, and in the course of his employment he was injured. The court said, in part:

> "In the case in hand, the plaintiff is not attempting to enforce a suit in rem against the vessel, nor is he attempting to prosecute a suit in personam against her master or her owner, nor to extend a contractural relationship born of state legislation beyond an immediate party, or the insurance carrier of the immediate party, to the contract. His attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed to them, and therefor substituted the new form of compensating industrial injuries which the legislature of their state has provided. Having done this, and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of state and nation may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal, and full. **** In all this there is no attempt to hinder, restrain or regulate commerce; no effort to establish, as against the vessel or her owner, a form of personal-injury compensation or of death benefit given by a state statute but unknown both to the admiralty and to the common law; no purpose to make a symmetry in the customs and ordinances of the sea."

In the instant case the parties can not be said to have "consciously contracted with each other in contemplation of the general system of maritime law," in fact they consciously contracted to be bound by the Compensation Act. In the

case of Northern Coal Company v. Strand, 278 U. S., 142, recently decided by this Court, the employee was regularly employed to do work on shore and on navigable waters unloading barges, and we submit that the decision in that case has no application here. All the cases on this point cited by petitioner in his brief, so far as we have been able to construe them, relate to injuries to longshoremen and stevedores who were engaged in maritime employment, and who must, therefore, be held consciously to have contracted with their employers in contemplation of the general system of maritime law, and the law as set forth in the decisions in those cases is not applicable to the facts in the instant case, where the contract was a lawful one between the parties and wholly non-maritime.

SECOND COUNTER PROPOSITION

(To Petitioner's Second Proposition)

There was ample evidence to justify the jury in finding for the Respondents (plaintiffs in trial court) and to support the judgment entered on such finding.

STATEMENT

Hal Cook was employed July 10, 1923, and worked for the Ford Motor Company for a little over three and one-half years. (R., 35.) During all that time he had been an exceptionally, strong and robust man:

> "I had known Hal Cook several years. I roomed at the same place he did one time. I would say that his age was around twenty-five; something like that. He was a little bit heavier built, I believe, than I am and not quite as tall. Ever since I knew him he was a good and healthy, strong man, able-bodied man. He worked all the time in the automobile plant of the Ford Motor Company. I never did know him to leave there sick or anything at any

time. He was always healthy and worked every day that he possibly could." (From testimony of E. B. Flukinger, witness for appellee. R., 29.)

"I had known Mr. Cook two years and four months prior to our marriage. He was six feet tall and weighed 165 pounds. He was engaged in his employment continuously over there at the Ford Motor Company. Mr. Cook was never sick while I lived with him prior to that time. He had a cold once in a while, but he never missed any work from being sick. Mr. Cook did not have any blemishes. He was in perfect health. I do not know of his ever being ill prior to the time I met him. He never stated that he had suffered any accidents or anything of that sort." (From testimony of Mrs. Myrtis Cook, R., 40.)

To the same effect is the testimony of J. A. Petrosky, (R., 41 and 42); of H. O. Windell (R., 57, 58 and 59) and of W. A. Tolar, witness for the petitioner, (R., 62) from all of which testimony it conclusively appears that Cook had never lost any time on account of illness during his employment; that he had no prior accidents or predispositions that would in any way disable him; and that on the night of twenty-fifth of January, 1927, he left home in good health and went to the boat with two of his companions, a strong, healthy and well man. (R., 38 and 44.)

Cook worked in his usual manner for about two hours, in no way complaining or showing any evidence of any disability of any kind.

"I stated that when I went down there and started to work that night, Hal Cook was with me. It was about two hours before he slacked up on his work. I could not tell the difference in his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any differ-

ence in him, that he was hurt or anything." (R., 59.)

In the lifting of the car parts in the boat, a workman did not have one person with whom he worked at all times, but the men in the same hatch would work with first one and then another. (R., 61 and 29.)

A workman working in the hatch would not necessarily have seen what happened to a person with whom he happened not to be working at the time:

> "If he had slipped or fallen there I would not necessarily have seen it." (Testimony of Mr. Petrosky, R., 60.)

The kind of labor that was being done was very heavy and the workmen were forced to do their lifting in a bent-over position:

> "We were unloading all kinds of parts, axles, front axles, springs and small parts. There were also batteries in there and rear axles. Those batteries were loaded four or five in a crate. I could not say how much they weighed. They would weigh approximately between 100 and 125 pounds. They were crated length-ways, five batteries in a length. I suppose those rear axles would weigh about 200 or 250 pounds. It took two men to handle them, one man on each end of the axle. (R., 42.) *** I consider the work down there unloading those parts heavy work. ***
>
> "I lifted some of that material with him. We were lifting rear axles, truck axles and also touring axles. Those things were stacked four this way and four that way. They were stacked from the bottom of the boat to the top, just as far as they went, axles and different things on top, small parts. As far as I recollect, there were small axles first, and then truck axles, and then small parts. In getting out that stuff we had to be on top of those axles and had to lift them out. We had no room to stand straight up." (R., 60.)

After Cook had worked about two hours his disability was first noticed as testified to by Mr. Petrosky as follows:

> "Cook went in there the same time I did to work, and he stayed in there an hour or two hours, something like that, before I missed him, and he was complaining of his back. He said his back was hurting him so bad that he thought he would have to go home, and he went up to see his boss. I heard him state that about his back hurting him. He was talking to me at that time when he complained of his back. He was standing up there holding his hand on his back. He had both hands in the small of his back like that, and said his back was hurting him. He seemed like he did not have any get-up about him. He went on deck, and I did not see him after that." (R., 42 and 43.) ***

> "I was working right there with him unloading that boat. The only thing I ever heard him say was that his back was hurting him. I never did hear him say that he received an injury of any kind or character while I was working there. (R., 43.) I stated that when I went down there and started to work that night Hal Cook was with me. It was about two hours before he slacked up on his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any difference in him, that he was hurt or anything." (R., 59.)

The testimony of Mr. Flukinger in regard to what happened to Cook on the boat is as follows:

> "I do not remember whether I saw Mr. Cook when he quit work. I remember seeing him go out of the hatch. I do not know how come him to go out of the hatch, but I saw him when he was climbing up out of the hold. He complained of his back before he left, before he went up out of the hold. We would

say, 'Cook, stand over to one side and don't work if you don't feel like it.' And we asked him how come he didn't go home. When he would stand up and he would hold his hands on his hips, on his back, standing up against the side of the hatch. When he left that was the last I saw of him, when he was climbing up out of the hatch." (R., 29.) ***

"It was after we had worked there several hours that he complained that his back was hurting. We had been working there quite a while when he left the ship. I could not say just how long it was. It had been so long since this happened I could not give you an idea in hours.

"Mr. Cook at no time ever told me that he injured himself in any way, shape, form or fashion. After he worked down in the ship for a while he just complained that he was sick and that his back was nearly killing him. Then after he started complaining he would hold his back with his hands every time he had a chance. I do not remember that he said his back was nearly killing him, just that way, but he said he was hurt or his back was hurting him, something like that. I could not say just what he said." (R., 31.)

Cook went home from the boat and had very excruciating pains thereafter, such that it was necessary to take opiates to relieve the pain. (Testimony of Dr. Dawes, R., 32 and testimony of H. O. Windell, R., 58.)

Cook was unable to go to work the next day and never worked thereafter. (R., 38.)

After neither the Ford Plant doctor, Dr. Whitehouse, nor the doctor to whom Cook was sent by Dr. Whitehouse, to-wit: Dr. James A. Hill, had done anything to relieve the pain, Cook called Dr. Carl F. Barnes. (R., 39.) Dr. Barnes gives very positive statements of what he did and found, as follows:

"I was called to wait on Mr. Hal Cook. I do not

remember the name of the street where I first saw him, but it was out toward the car barns. It was at his home.

"The man was suffering excruciating pain when I saw him, pains that started somewhere in the abdomen and went downward and settled in his testicles. That is the way he expressed it. The left testicle was affected. The testicle was slightly swollen. There was a varicose condition in the scrotum.

"I operated on him and removed a section of the vein. That operation healed up properly. I do not know how long it took for that to heal. It healed in about the ordinary time, seven or eight days, something like that.

"After I operated on this man I continued to go to see him. For about two or three days the man got relief. After that the pain came back as severe as it ever was, if not more so. For about two or three days the man seemed to have gotten relief from that pain, but after that it was just as severe as it was before, if not more so. The man complained all the time of suffering pain in the abdomen; that is somewhere in about this place, and that pain would go downward toward his testicles all the time. The pain, he said, would start on the inside and go down and settle in his testicle.

"When I first made an examination of this man he was suffering pain. He told me at that time what he considered was the matter with him. He said he was working unloading some parts to a car, axles, if I remember correctly, and that he felt something give way on the inside of him, is the way he expressed it, and he suffered pain and felt fainty, and I think he told me he asked his boss something about it and he let him on some lighter work that night, and from then on he had pain. That is about what he told me.

"After I had operated on him for this varicose

vein and had removed it, I found it necessary to remove him to the Methodist Hospital for the purpose of giving him better treatment out there and seeing him oftener each day. I suppose I saw him on the average of twice a day during the time he was out there. I think one day I went five times. ***

"My idea is that it was strain, that lifting, just like the blood vessels anywhere else, in your head or any other part of your body. That is my judgment, it was a ruptured blood vessel.

"A strain, something like that, lifting, will cause varicose veins. That is one of the most prevalent causes. ***

"When a man loses blood he becomes pale and becomes slightly jaundiced or yellow because he has not enough red blood cells to make the red color. He loses weight.

"This patient continued to lose weight. He was not weighed, but he continued to lose, by the looks of him.

"The record shows that he stayed there from the first of March until the twenty-third of March. It was my judgment when he went home that he could not get well. That was my idea about it. He died fifteen days after that. ***

"Assuming to be correct what the deceased told me, that he was lifting something out of there on this boat, and that he felt something tear loose inside, and that was the history of the case so far as I knew, it would logically follow as a pathological proposition that this could happen.

"The primary healing of that operation was all right. It healed up primarily just like all wounds heal up. I can not see why that could have caused this condition. I can not see any reason why it could have.

"It would be my diagnosis that this strain was the primary cause of this man's condition, and that he did rupture one of those vessels—which one I do not know—but he had symptoms of a ruptured vessel. The man had hemorrhages during the time I was waiting on him out there at the hospital. He had hemorrhages through the bowels. That would logically follow the rupture of a blood vessel inside.

"During the time this man was in the hospital I called in other physicians in this case in consultation. Dr. DeWalt and Dr. Kuebler, and Dr. Hayes, and Dr. Priester saw him. I called them in because it was an unusual case, to get their opinion. After having those consultations with those doctors I did not have any reason to change my treatment of the case. ***

"His body was just breaking down. We did not find any typhoid. My diagnosis was that he did not die from any of the different germs or different cocchi.

"The condition that I operated for was simple varicocele. I never heard of anybody dying from varicocele. It is an enlarging of the veins that supply the testicles and makes a knotty growth around the veins. A strain, standing on the feet and such as that might cause it. ***

"I believe from this history this man gave me he had a ruptured mesenteric vessel. There is a difference between a ruptured mesenteric vessel and varicocele. They are different veins altogether. He had varicocele, and I think he had this other besides. I really do not think the varicose condition had anything to do with his death. I think it had nothing whatever to do with his death. It was not sufficient to cause his death, unless by reason of the operation he got some infection, which he did not get. I do not believe I ever heard of a man dying from an operation for varicocele.

"I determined that there was apparently a thromboid condition there from the history of the case. The man gave a history of a fainty condition when he first became injured, got fainty and thirsty for water, like anybody who has lost blood, and I connected that up with the instant pain he had, radiating down in the pelvic region, following where those vessels would go.

"I would not think that varicose condition had anything to do with that. That was just a coincidence, something coming along with it. That is what I think about it.

"His temperature rose just about the time he was passing blood. My deduction is that that was caused from severe inflammation of the bowel wall, the little capallaries supplying the bowel becoming so saturated and breaking through and filling the bowels up with blood. That was about ten days after he claimed to have been injured. That is one reason that I made the diagnosis that I did. The blood vessels dam up and that is nature's remedy to try and relieve the congestion. That is my belief about it.

"If he had not given any history of having received any strain at all I would have said I did not know what in the dickens was the matter with him. When he gave the history of a strain that made a satisfactory reason for the conditions I found. It does look to me, with a man giving a history of lifting something, turning sick at the stomach, fainty like, and wanted water and had to have water right away, there was something happened like the rupture of a blood vessel and loss of blood. That is the way it looks. That is the history I took of him." (R., 45, 46, 47, 48, 53, 54 and 55.)

AUTHORITIES

Southwestern Surety Ins. Co. v. Owens, 198 S. W., 662.

Roland v. Employers' Casualty Co., 290 S. W., 895, (Affirmed 1 S. W., 2nd, 568.)

E. Baggot Company v. Industrial Commission et al, 7 A. L. R., 1611.

Elizabeth Patrick v. J. B. Ham Company et al., 13 A. L. R., 427.

Lindberg v. Southern Casualty Co., 15 Fed., 2nd 54.

Texas Employers' Ins. Assn. v. Shipley et al., 260 S. W., 646.

Gilliland v. Ash Grove Lime & P. Cement Co., 180 Pac., 793.

Manning v. Pomerene, 162 N. W., 492.

State ex rel. Puhlmann, 162 N. W., 678.

Kiercok v. Philadelphia & R. Coal & I. Co., 270 Pa., 17, 112 Atl. 746.

Clover, C. & Co. v. Hughes, A. C. (Eng.) 242.

Texas Employers' Assn. v. Jimenez, 267 S. W., 752.

Georgia Casualty Company v. Little, 281 S. W., 1902.

Security Union Ins. Co. v. Alsop, 1 S. W., 2nd, 921.

Miller's Indemnity Underwriters v. Schrieber, 240 S. W., 963.

Miller's Indemnity Underwriters v. Heller, 253 S. W., 853.

Consolidated Underwriters v. Free, 253 S. W., 941.

Travelers' Ins. Co. v. Smith, 266 S. W., 576.

Texas Employers' Ins. Assn. v. Davidson et al, 5 S. W., 2nd, 1008.

22 Corpus Juris, p. 84, Sec. 27.

ARGUMENT

The statement preceding the above list of authorities clearly indicates the quantum of proof before the jury in the trial of this case, and we submit that the same was ample to justify

its finding and support the judgment entered thereon. But before comparing the quantum of evidence in this cause with that adduced in the above cited cases, wherein the sufficiency of the evidence was questioned and held ample to support a judgment under the compensation acts of the respective judisrictions, we deem it appropriate first to consider the rule of construction of workmen's compensation statutes generally in the light of their purpose and then in the light of their application to specific fact situations.

No such strict construction as to what constitutes "proximate cause" is indulged in compensation cases as in cases of negligence. This rule is stated in the case of Georgia Casualty Co. v. Little, 281 S. W., 1094, as follows:

> "No strict construction of the term 'proximate cause' as used in the law of negligence, can be applied to compensation cases under our compensation statute (Vernon Sayles' Ann. Civ. St., 1914, arts. 5246h-5246zzzz.) Travelers' Ins. Co. v. Smith (Tex. Civ. App.) 266 S. W., 576. The courts have uniformly made a liberal interpretation and application of the Compensation Act so as to effectuate its purposes. Texas Employers' Ins. Assn. v. Jimenez. (Tex. Civ. App.) 267 S. W., 753; Employers' Liability Assn. Corp. v. Light (Tex. Civ. App.), 275 S. W., 685. And where the evidence has any probative force in support of the judgment we are not at liberty to disturb it. Ins. Assn. v. Jimenez, supra; Wade v. Madison, (Tex. Civ. App.), 206 S. W., 118."

The reason for the above designated policy in the construction of compensation statutes lies in the humane doctrine that the purpose of the passage of such acts is to place upon industry the costs of industrial accidents, as stated in the case of City of Milwaukee v. Miller, 154 Wis., 652, 144 N. W., 188, L. R. A., 1916A, 1 Ann. Cas., 1915B, 847 and quoted with approval by our courts in the cases of Roland v. Employers' Casualty Co., 290 Tex., 898, and General Accident Board v. Evans, 201 S. W., 705, as follows:

> "A proper administration of the Workmen's Com-

pensation Act requires appreciation of the manifest legislative purpose to abolish the common-law system regarding injuries to employees as unsuitable to modern conditions and conceptions of moral obligations, and to erect in place thereof one recognizing every personal loss to an employee, not self-inflicted, as necessarily entering into the costs of production, and required to be liquidated in the steps ending with compensation. *** The foregoing views aptly express, we think, those things that should serve as a guide in the interpretation of a statute like the one to which they relate."

The evidence in the case of Southwestern Surety Company v. Owens, 198 S. W., 662, was held to show an accidental injury suffered in the course of his employment. Writ of error was denied by the Supreme Court of Texas. Mr. Hinton of Randolph Paint Company testified that he was up on the floor where Owens was stacking paint several times during the day and Owens was at work, that a consignment of paint had been received during the day which was being stacked in the storage room upstairs and deceased was removing the cans that would weigh about 100 pounds from the elevator to the place where they were being stacked. Then Hinton testified about the injury as follows:

"I saw Will Owens that afternoon when he was unable to stack paint. I would say that it was right at six o'clock, maybe 15 minutes of 6 o'clock. I went upstairs at that time. I saw Will Owens when I got there. Will was leaning against a pillar or banister when I got there. There is just a short turn in the stairs, and a rail about two feet long, and there is a pillar at the turn, at the end of it. I saw symptoms of Will's being in pain. It was very evident, very pronounced. He had been bleeding from the mouth, and he was gasping somewhat for breath. He was spitting blood, and there was blood on his face, and he was gasping for breath. When I got there where he was standing there was a five-gallon kit of outside white paint near where he was standing. The

weight of that kit is approximately 100 pounds. He was stacking this paint five high. When I got there there were four actually up on the stack in front of Will, four already up. *** I would not be able to state definitely how long before this I had seen Will, but I do know that he was lifting paint there all that afternoon. Will said something to me there. He said he 'had done busted something lifting that can of paint.' After he said that I helped Owens to a seat, and he seemed to be in a pretty bad shape. He did not do any more work that day. As soon as he was able he was taken home. *** I do not think I ever saw him at the store after that. I saw him at his home just before he died. He died within a month or six weeks after that. Prior to this occurrence Will L. Owens suffered a little injury in the spring of the year, lifting a piano at the church. He was laid off only a very short time then. He came back to work after that. ***"

The court in its finding says:

"The evidence shows that in April, 1914, Will Owens was injured while lifting a piano, and as a result of such injury suffered for a week or ten days from hemorrhage from the lungs or chest."

Dr. Neuhaus, who had never seen the injured, testified as an expert, in substance that the most probable diagnosis as to the cause of the return of this hemorrhage on October 23, 1914, was that the little blood vessel which burst in April had burst again; "that the scarification caused this blood vessel to be weak, and it burst again," and the doctor further testified:

"Assuming that this patient gradually declines until December 10th, this injury being on October 23rd, and during that period he is troubled with fever, say the same symptoms followed the October 23rd injury as in April, and he gradually declined in strength and weight and died on December 10th, I would say that an infection of the lacerated place in

the lungs where the bleeding took place could cause that."

In the Owens case no person was present and saw any injury occur. Owens had burst a blood vessel in moving a piano at the church which had caused hemorrhages some seven months prior to the occurence at the paint company, the doctor had never seen or treated Owens and said that an infection of the old lacerated place could have caused the symptoms preceding Owens' death, yet evidence in this case was held sufficient under our compensation law and represents the weight of authority we believe in the United States as well as Texas, as is disclosed by the frequent following and citing of the case in this State and other jurisdictions as will appear from an examination of the annotated notes in 7 A. L. R., 1614 and 13 A. L. R., 438.

In view of the undisputed fact that Cook was an exceptionally robust, healthy and strong man, went to work in fine condition, after about two hours slacked up work in fainty condition, complaining with his back, and giving history to his doctor of something pulling loose in him, having hemorrhage of the bowels thereafter until he wasted completely away and died; and then the very doctor that treated him and saw him from day to day giving as his opinion after summarizing the whole case to the court, that there were no cocci present and that it was his opinion and belief that Cook ruptured a blood vessel which was the primary cause of his death (R., 54 and 55), we believe that this case presents a much stronger fact situation for the consideration of the jury than did the Owens case; and we further believe the Owens case is properly decided and is in keeping with the purpose and intent of the compensation law.

The facts proved in Roland v. Employers' Casualty Co., 290 S. W., 895, which case was appealed and affirmed by the Supreme Court of Texas, 1 S. W., 2nd, 568, were briefly as follows: Mrs. Roland sued to recover under the Workmen's Compensation Act of the State of Texas, for the death of Roland, a well driller, whom she alleged was injured while drawing some pipe from the well, in that he strained himself and thereby ruptured his appendix. The Industrial Accident

Board had refused to allow the claim and the trial court had denied recovery, but same was reversed and rendered on appeal to the Court of Civil Appeals and affirmed by the Supreme Court. One of the assignments of error was that there was no evidence showing that Roland had received an "industrial injury," during the course of his employment, from which he died. The court summarizes the evidence as follows, on page 899 of the report:

> "The evidence shows that Roland did most of the work around the well, especially in the absence of the driller, and that part of his duties was the lifting of heavy joints of pipe, some of which weighed 450 pounds; that at the time of the claimed injury he was doing this kind of work. Mr. D. C. Grove, the driller, testified that he came on duty on that well the morning that Roland received his claimed injury, and that there was lifting to be done; that he saw Roland lift a pipe at that time weighing about 450 pounds; . at after this lifting he saw Roland sitting down; this was an unusual thing for Roland to do; he gave evident signs of being in distress or pain; he did not look like a man who was fit to work; he looked like a man in pain, and certainly not in his ordinary health."
>
> "Dr. E. W. Wright testified that he treated Roland during his last illness, and that he found that he was suffering from a ruptured appendix; that in his opinion, a diseased appendix is more likely to rupture during exertion than while a person is lying still. He further testified that in his opinion, the perforation or rupture of the appendix occurred at a time agreeing with the time when Roland was doing this lifting, after which he sat down, evidently in pain."

Such was the evidence upon which the court in the Roland case reversed and rendered the judgment of the trial court and in its discussion of the sufficiency of the evidence, and to show the reason for its action, quotes, cites and comments as follows:

"Our statute (Title 130, Art. 8309, Subd. 5) under Section 1, Revised Statutes, defines the term injury as follows: 'The term "injury" or "personal injury," shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.'

"In Babich v. Oliver Iron Mining Company, 157 Minn., 122, 195 N. W., 784, 202 N. W., 704, it is said:

"'A sudden and violent rupture or break in the physical structure of the body of an employee, caused by some strain or exertion *** is an accidental injury within the meaning of the Compensation Act, even though no external unforeseen event such as slipping, falling or being struck contributes thereto.'

(Court here quotes from Owens case, supra):

"In Fort Worth Mut. Benev. Assn. v. Miller, 280 S. W., 338 by this court, opinion by Chief Justice Connor, writ of error dismissed by the Supreme Court, it was held that the bursting of a blood vessel, while the injured was trying to push a car which had stalled in the sand, was an accident and the beneficiary of the accident policy was entitled to recovery.

(The court here quotes from General Accident Board v. Evans, supra, and City of Milwaukee v. Miller, supra, the section above quoted relative to entering into the cost of production the burden of industrial injuries and after citing a number of cases comments as follows):

"Most of these cases cited hold that injuries received internally but from some external force, or as the result of muscular contraction due to strain, constitute industrial injuries."

The court in the Roland case found on motion for rehearing that the evidence sustained the conclusion that the deceased prior to the alleged injury which preceded his death, had been suffering from some pain in his appendicital region, yet concluded that the evidence justified holding that Roland

had ruptured his appendix and that such predisposition to appendicitis would not preclude a recovery. On all the facts the testimony is stronger in the case before this court than that in the Roland case, in that there was no predisposition of Cook toward any kind of disability, and the doctor's opinion is based on logical, strong and undisputed history of the injury as well as hemorrhage of the bowels following the injury which can not be accounted for by natural causes such as appendicitis.

In the case of E. Baggot Company v. Industrial Commission, 290 Ill., 530; 125 N. E. 254; 7 A. L. R., 1611, the Supreme Court of Illinois had under consideration a case whose facts were less probative of an injury sustained in the course of employment than in this case. The evidence in that case showed the deceased, Cripp, was engaged in hauling up some pipes used in plumbing which weighed between 250 and 300 pounds. The lifting was being done by two men using a windlass. When the load was landed, deceased started to walk away from the windlass spitting blood, made no statements, "nothing unusual happened while the work of lifting the last load of pipe was in progress, the work was heavy, but it was the same kind of work that the two men had been doing for a couple of days." Hemorrhages continued for about 14 days and deceased died. It was held that deceased sustained an accidental injury in the course of his employment and that there was ample evidence to justify the industrial commission in its finding. The annotation following the report of this case in 7 A. L. R., is particularly valuable in giving a review of a number of similar cases where internal injuries caused hemorrhage.

In the case of Elizabeth Patrick v. J. B. Ham Company, 111 Atl., 912; 13 A. L. R., 427, the Supreme Court of Maine held that there was ample evidence to justify the decree of the commission in allowing a recovery for death of Patrick caused by cerebral hemorrhage. The evidence showed Patrick lurched slightly in swinging up two sacks of grain weighing about 100 pounds each, he being hold of one end and another workman lifting the other end. That on the third sack when Patrick stooped to catch hold of same he fell across the bag and was assisted to the office and died about eight

hours later without regaining consciousness. Two physicians testified that the cause of the death was cerebral hemorrhage, and there was testimony that deceased went to work after dinner in apparently healthy condition. The court held that the fact that Patrick was suffering from diseased arteries, predisposing him to cerebral hemorrhage was of no consequence. We submit that such facts are not nearly so strong as those in the instant case.

We believe that the cases hereinabove discussed are ample to disclose the decided weight of authority in compensation cases in reference to the quantum of evidence required where internal ruptures or strains are involved. However, we shall briefly review the quantum of evidence disclosed in a few of the other cases hereinabove cited. In Lindberg v. Southern Casualty Co., 15 Fed. 2nd, 54, certiorari denied by this court, the quantum of evidence was questioned where it was shown that the deceased fell from the dredge into the water when one of the fellow workmen noticed him sitting on the edge of the dredge with his head in his hands and asked him what was his trouble. It was held, in line with the great weight of authority, we believe, that there was ample evidence to support the judgment.

In the case of Texas Employers' v. Shipley, et al., 260 S. W., 646, our court quotes from 22 Corpus Juris, p. 84, Sec. 27, as follows:

> "An inference of fact should not be drawn from premises which are uncertain, but the facts upon which an inference may be legitimatley rest must, it is said, be established by direct evidence as if they were the very facts at issue. It follows that one presumption can not be based upon another presumption. It is, however, permissible for a court or jury to draw several conclusions or presumptions of fact from the same circumstances, and in order that a presumption may be indulged, it is not necessary to believe that the thing presumed has been actually done, but it is sufficient if the evidence leads to a conclusion that it may have been done, and that its

existence would be the solution of the difficulty arising from its non-existence."

In Clover, C. & Co. v. Hughes (1910) A. C. (Eng.) 242, 79 L. J. K. B. N. S., 470, 102 L. N. S., 340, 26 Times L. R., 359, 54 Sol. Jo., 375, 3 B. W. C. C., 275, 47 Scot. L. R., 885, upheld by the court of appeals and House of Lords, it was held that where a workman was suffering from an aneurism in such an advanced state that it might reasonably have been expected to burst at any time, and it did burst while he was tightening a nut, which caused a strain ordinarily in his work, that there was an accident within the meaning of the English Workmen's Compensation Act.

Our courts apply the rule that the appelate court must consider the evidence of the record most favorable for the plaintiff from the position of the injured party just before and at the time of the accident, Texas Emp. Ins. Assn. v. Davidson, 5 S. W., (2d), 1008. We believe that the undisputed evidence, concurred in even by the witnesses called by the defendant, that Hal Cook was an exceptionally healthy, robust and strong man at all times prior to the injury and even during the first two hours approximately that he worked, and further considering the uncertainty of the testimony of the record as to whether Hal Cook, while on the boat, stated he had hurt himself or was hurting, and considering further the fact that he had suddenly to stop work, feeling fainty, had to leave the place where he was working and go up on the deck of the ship, and considering that the lifting was exceptionally heavy and that the employees had to do their work in a bent-over position, there not being room to stand upright, and considering the fact that this man constantly thereafter had severe and excruciating pains, that no cocci of any kind and no disease of any kind was ever present, that he constantly had hemorrhage of the bowels and that he gradually wasted away and died; that the doctor that treated him from day to day and that actually made examinations of him could find no explanation whatever for his death other than a ruptured blood vessel, exactly in line with the history of the injury given by the deceased to his doctor, to-wit, that he felt something give way on the inside of him and

suffered pain and felt fainty while he was lifting a car axle, and considering all of the other facts and circumstances before the jury in this case, we believe that the preponderance of the evidence shows that Hal Cook ruptured a blood vessel which caused his death. We do not believe that any of the evidence adduced by the Appellant, practically all of which was based on hypothetical questions, gives any logical or reasonable theory for Hal Cook's death, and that the character of the evidence before the jury was such that it could and did reasonably satisfy the jury that Cook ruptured a blood vessel which caused his death. In this case there was no predisposition toward any disease whatsoever. Neither was there any sudden death such as frequently occurs from heart failure, paralysis, or appendicitis as the facts in many of the cases cited show, but all the symptoms as shown by the evidence of both parties show a gradual breaking down and wasting away of the deceased following the strain which he received on the boat.

It is very clear from a review of the foregoing Texas authorities and authorities in other states, particularly in cases where death has sealed the mouth of the injured, that where there has been a tearing, straining, severing or rupturing of internal organs of the body while the employee is engaged in his work and as a result of the heavy lifting or straining position of the employee engaged in such work, such severing, rupturing, tearing, or straining of any of the internal organs or tissues is an injury within the purview of the Workmen's Compensation Law. And we submit that the preponderance of credible testimony in this case unquestionably shows that Hal Cook died as a result of the rupturing of a blood vessel within his body, thereby gradually reducing his vitality until he died.

We have reviewed all the cases cited by the Appellant and have been unable to find therein any reason why this Court should disturb the finding of the jury and the judgment entered thereon in this case.

We submit that the explanation given by Dr. Barnes, the physician who constantly attended deceased and who called in other physicians to advise with him, is the only logical

and reasonable theory given as to the cause of Cook's death. We further submit that the jury in making its findings did not have to base any presumption upon another presumption, but had uncontradicted testimony which established facts to support any inferences they might have drawn. The circumstances proved in this case are so strong, and the doctor's opinion is so logical and based upon such undeniable facts, that we could not see how any reasonable man could have concluded differently from the jury's findings. Any inferences that the jury might have indulged in were based upon the undeniable facts concurred in by witness of the defendant, that the man was strong, healthy and robust up to the night of his injury; that deceased worked for about two hours in his usual manner; that after that the witnesses before the court who were working in the same hatch noticed him slack up on his work, heard his complaints as to terrific pains, saw him leave the hatch where he was working; that he went home ill and in terrific pain and continued to have such pains up to the time of his death; that he had frequent hemorrhages of the bowels; and that he finally died as a result of gradual wasting away of his blood.

CONCLUSION

We believe that the various specifications and propositions relied upon by Petitioner are without merit and that therefore the Writ of Certiorari for which it prays should be denied; and we furthermore believe that the findings of the jury and the judgment of the Honorable Trial Court and Honorable Circuit Court of Appeals are not only proper but subserve the ends of substantial justice; and we therefore pray that the Writ of Certiorari requested by the Petitioner be in all things denied.

Respectfully submitted,

By D. A. SIMMONS,
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APPENDIX A

"Article 8306. Sec. 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury, or was so caused while the employee was in a state of intoxication.

4. In all such actions against an employer who is not a subscriber as defined hereinafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment. ***

"Sec. 3. The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employee and their representatives and beneficiaries shall look for compensation solely to the association as hereinafter provided for. ***

"Sec. 3a. An employee of a subscriber shall be held to have waived his right of action at common law or under any

statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed said right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within five days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law or under any statute may thereafter waive such claim by notice in writing, which shall take effect five days after its delivery to his employer or his agent. Any employee of a subscriber who has not waived his right of action at common law under any statute to recover damages for injury sustained in the course of his employment, as above provided in this section, shall, as well as his legal beneficiaries and representatives have his or their cause of action for such injuries as now exist by the common law and statutes of this State, which action shall be subject to all defenses under the common law and statutes of this State.

"Sec. 3b. If an employee who has not given notice of his claim of common law or statutory rights of action, or who has given such notice and waived the same, sustains an injury in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if the employer is a subscriber at the time of the injury. *** (Sec. 3c provides for notices to be given in case employer ceases to be a subscriber.)

"Sec. 4. Employees whose employers are not at the time of the injury subscribers to the said association *** can not participate in the benefits of said insurance association, but they shall be entitled to bring suit and may recover judgment against such employers, or any of them, for all damages, sustained by reason of any personal injury received in the course of employment or by reason of death resulting from such injury, and the provisions of Section 1 of this law shall be applied in all such actions."

"Article 8309. Sec. 3. Any subscriber who has paid a premium as provided in Section 1, Part 4, of this law may, upon application to the Board and to the association and after show-

ing satisfactory to the Board that he has notified all of his employees, in such manner as may be required by the Board, cease to be a subscriber, and be entitled to a refund of the unearned portion of his premium, subject, however, to any rule approved by the Commissioner of Insurance as to the minimum premiums or short rate cancellation."